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August 25, 2006

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Office of Proceedings

AUG 25 2006

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Public Record

Via Hand Delivery

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423

Re: S.O. 1526
Petitions of Albemarle Corporation for Emergency Service Order and Immediate Relief Under 49 U.S.C. § 721(b)(4)

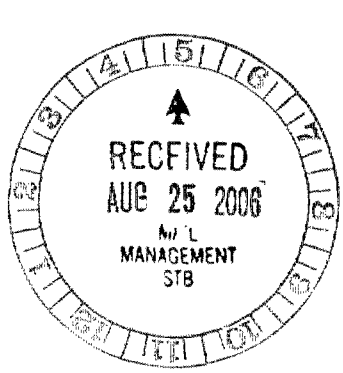
Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding is **The Louisiana and North West Railroad Company's Reply In Opposition** to the Petitions filed by Albemarle in this proceeding.

Please contact me if you have any questions regarding this matter. Thank you.

Respectfully submitted,

Edward J. Fishman
Attorney for Louisiana and North West Railroad Company



BEFORE THE
SURFACE TRANSPORTATION BOARD

S.O. 1526

PETITIONS OF ALBEMARLE CORPORATION
FOR EMERGENCY SERVICE ORDER AND IMMEDIATE RELIEF
UNDER 49 U.S.C. § 721(b)(4)

REPLY OF THE LOUISIANA AND NORTH WEST RAILROAD COMPANY IN OPPOSITION TO ALBEMARLE PETITIONS

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ATTORNEYS FOR THE LOUISIANA AND NORTH WEST RAILROAD COMPANY

Dated: August 25, 2006

BEFORE THE
SURFACE TRANSPORTATION BOARD

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PETITIONS OF ALBEMARLE CORPORATION
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REPLY OF THE LOUISIANA AND NORTH WEST RAILROAD COMPANY IN OPPOSITION TO ALBERMARLE PETITIONS

Pursuant to 49 C.F.R. § 1146.1(b)(2), the Louisiana and North West Railroad Company ("LNW") respectfully submits this Reply in Opposition to the Petition for Emergency Service Order and the related Petition for Immediate Relief (collectively, "Petitions") that were filed on August 18, 2006 by Albemarle Corporation ("Albemarle"). Albemarle provides no legal basis for its unprecedented and extraordinary request to displace LNW from its own property as a result of a continuing dispute over the applicable charges for intra-plant switching services that are not part of LNW's common carrier obligation.

LNW has in the past and will continue to provide adequate common carrier linehaul service between LNW's Class I connections and the Albemarle plant, and remains ready, willing and able to provide intra-plant switching service on terms that are commercially acceptable to LNW in light of the significant liability risks that LNW bears in storing and switching chlorine and other highly hazardous materials for Albemarle on LNW property. However, in the absence

of any showing by Albemarle that there has been a substantial deterioration in the common carrier service provided by LNW, Albemarle is not entitled to the emergency relief it seeks in this proceeding and LNW has every right to stop its intra-plant switching for Albemarle unless and until the parties reach an agreement on mutually acceptable terms.

The filing of the Petitions is Albemarle's latest salvo in a protracted dispute that is pending before the Board in Docket No. 42096. Albemarle once again relies on sweeping and unfounded claims about LNW's common carrier obligations and hypocritical accusations about LNW's negotiating tactics to draw the Board's attention away from the root causes of this dispute – Albemarle's refusal to invest in adequate storage track and weighing facilities within its plant, Albemarle's refusal to recognize LNW's legitimate concerns about storing and switching highly hazardous materials (including significant volumes of chlorine) for Albemarle on LNW property without adequate liability and economic protection, and Albemarle's refusal to take commercially reasonable steps to minimize its reliance on LNW as a "parking lot and shuttle service" for its tankcars of hazardous chemicals.

At a time when serious concerns have been raised in the railroad industry about the dangers of hauling toxic materials, and while communities seek to impose restrictions on the routing of such toxic substances in the deadly wake of the Graniteville tragedy, Albemarle is content to malign LNW's legitimate concerns about handling carloads of chlorine over its 75-pound rail as "pure hyperbole."[1] Instead of working with LNW to address its safety concerns in a commercially reasonable manner, which other railroads and chemical shippers have done recently, Albemarle is content to use its economic might to force LNW into an unacceptable status quo arrangement whereby LNW is prevented from implementing liability protections or

[1] See August 22, 2006 Letter from Martin Bercovici to the Honorable Vernon Williams ("Aug. 22 Letter") at 3.

increasing its switching charges to a level commensurate with the significant risks that it continues to bear on Albemarle's behalf.

Albemarle has managed to turn the regulatory framework on its head, and continues to use every opportunity it can to squeeze the much smaller LNW into submission. Albemarle's latest request for relief (the third separate Board proceeding it has initiated against LNW and the fourth overall including the court litigation) epitomizes Albemarle's *modus operandi* – filing a baseless claim for relief when its true motive is to avoid paying the rate or charge assessed by LNW, which Albemarle is obligated to pay (under 49 U.S.C. § 10702 and applicable precedent) in the first instance in order to receive service from LNW (regardless of whether the services provided by LNW are part of LNW's common carrier obligation).

Albemarle continues to pay LNW only $121 per switch (based on an accounting of switches unilaterally determined by Albemarle) and minimal annual storage track lease payments while LNW continues to store and switch highly hazardous materials that, if released in the event of an accident, would most likely cause significant damage, wipe out all of the assets of the LNW and leave other injured parties without any recourse. Albemarle has forced LNW into this untenable position, and therefore LNW must take steps to protect its interests in the absence of a Board ruling on whether it must store and provide intra-plant switching of hazardous materials for Albemarle.

For the reasons set forth herein, LNW respectfully urges the Board to deny the Petitions and to confirm (as LNW has requested in Docket No. 42096) that (i) LNW is not under a common carrier obligation to provide storage on its own property for Albemarle's hazardous materials, and that (ii) LNW is not under a common carrier obligation to provide intra-plant switching between the Albemarle storage tracks on LNW property and the Albemarle plant.

This storage and intra-plant switching service is separate and apart from the common carrier linehaul service LNW provides to Albemarle, and is not subject to the Board's regulatory jurisdiction or its emergency authority under 49 U.S.C. § 11123(a).

I. BACKGROUND

Although much of the background underlying the dispute over the applicable charges for intra-plant switching is set forth in Docket No. 42096, there have been several recent developments that warrant mention here because of hypocritical accusations made by Albemarle about LNW's negotiating tactics. Earlier this month, LNW reached out to Albemarle in an effort to reach an amicable resolution to the pending dispute between the parties. As a result of agreements reached during those discussions, on August 7th Albemarle returned 100% of the intra-plant switching business at its South Plant to LNW (which historically has provided all intra-plant switching at the South Plant for Albemarle, but which has experienced a substantial reduction in its switching business there since Albemarle started performing its own switching earlier this year through a third party contractor). Albemarle's Supply Chain Manager Danny Wood notified LNW's General Manager Larry Brooks on August 4th that Albemarle would provide at least twenty (20) days notice to LNW before Albemarle resumed its own switching.

On August 16, following additional discussions between the parties, Albemarle's Mr. Wood warned LNW's Mr. Brooks that Albemarle would resume its own intra-plant switching activity on Monday, August 21, 2006 (in violation of the 20-day notice commitment made earlier by Albemarle) if the parties did not reach a resolution on remaining issues in dispute. On August 17, Mr. Wood informed Mr. Brooks that Albemarle would be bringing back to the South Plant the following day (August 18) the railcar mover it leases to perform its own switching. At that point, LNW's Mr. Brooks notified Albemarle's Mr. Wood that LNW was more than willing and

able to handle all of Albemarle's intra-plant switching needs at the South Plant but would only do so if LNW was allowed to provide all such switching. On August 18, the following events occurred in sequence: (i) Mr. Wood informed Mr. Brooks that Albemarle would resume its own switching operations on Monday, August 21, (ii) Mr. Brooks informed Albemarle that LNW would not provide any intra-plant switching unless Albemarle agreed to pre-pay $400 per car based on a minimum of 8 cars per day, 4 days per week;[2] and (iii) Albemarle's counsel filed the Petitions.

The above recitation of events demonstrates that it is Albemarle, not LNW, which treats intra-plant switching service "as a yo-yo on a string, to be held out and then withdrawn at its whim as a negotiating tool" in this dispute.[3] In addition, the facts demonstrate that Albemarle has not abided by its commitment to provide 20-days notice to LNW before again pulling the intra-plant switching business away from LNW. Moreover, the facts also demonstrate that Albemarle's real objective here is to avoid paying the charges assessed by LNW for the intra-plant switching services. Albemarle was more than willing to return 100% of the intra-plant switching business to LNW in early August, and only made the decision several weeks later to pull that business back to itself as a negotiating tactic (not because of any legitimate concerns with LNW service).

LNW has continued to provide limited intra-plant switching service to Albemarle this week as requested by Albemarle (even though Albemarle has not agreed in writing to LNW's

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[2] The communication from Mr. Brooks also required that Albemarle pay in full all intra-plant switching charges retroactive to December 12, 2005 at the $400 per car rate before LNW would provide intra-plant switching. On August 21, 2006, the undersigned filed a letter in this proceeding clarifying the terms of LNW's offer and eliminating the retroactivity condition.

[3] See Albemarle Petition for Emergency Service Order filed August 18, 2006 ("Albemarle Petition") at 5. The facts also flatly contradict Albemarle's claim that LNW "is using service to the storage track as leverage" in this dispute. See August 22 Letter at 2.

$400 per car proposal). Albemarle has used its leased equipment and third party contractor to perform the bulk of its switching at the South Plant. LNW performed 6 switches on Monday, 3 switches on Thursday and 2 switches on Friday. By asking LNW to perform these switches, LNW believes that Albemarle has acquiesced and should be responsible for paying the $400 per car charge based on a minimum of 32 switches per week.

Although LNW does not believe it is bound by the 20-day notice provision discussed further herein, and although LNW has continued to provide intra-plant switching to Albemarle this week despite Albemarle's failure to agree to the $400 per car offer by LNW, LNW must take steps to protect its interests. LNW cannot allow the current situation, where its stores and switches chlorine and other highly hazardous materials on its property for Albemarle without adequate liability and economic protection, to continue indefinitely while Albemarle refuses to reach a commercially reasonable settlement. Thus, LNW hereby provides notice to the Board and to Albemarle that it will continue to provide intra-plant switching for Albemarle based on the $400 per car charge (with a minimum of 8 switches per day, 4 days a week). However, if Albemarle does not start paying those charges on a pre-paid basis and does not pay the charges that have accrued since LNW made this offer on August 21, 2006, LNW will stop delivering and switching cars to or from the storage tracks located on LNW property on the west side of the LNW main line within 20 days from the date hereof. Albemarle will have the next 20 days to remove its cars that are currently stored on LNW property (through LNW's intra-plant switching services) if it does not intend to start paying the intra-plant switching charges established by LNW.

II. PROCEDURAL MATTERS

As noted above, the undersigned filed a letter in this proceeding on August 21, 2006 in

order to clarify LNW's offer to continue providing intra-plant switching service at a rate of $400 per car based on a minimum of 8 cars per day, 4 days per week. The letter noted that LNW had made this offer in a good faith effort to resolve the dispute over intra-plant switching charges but without waiving LNW's right under 49 C.F.R. § 1146.1(b)(2) to file a Reply within five (5) business days of Albemarle's Petition if Albemarle did not accept the proposal in writing. Albemarle has not accepted the proposal, and therefore LNW has submitted this Reply within the applicable 5-day period.

In its August 22 Letter, which Albemarle refers to as a "Rebuttal" despite LNW's stated intent to file a subsequent Reply, Albemarle claims that the pleading cycle in this proceeding is closed.[4] LNW disagrees with Albemarle's interpretation of the applicable rules, particularly in light of LNW's stated intent to file a Reply if its settlement proposal was not accepted. LNW respectfully urges the Board to accept this filing as LNW's Reply under § 1146.1(b)(2). Alternatively, LNW submits that the instant pleading should be accepted in the interest of developing a complete record because it clarifies certain misstatements of fact and law in the Albemarle Petitions and "Rebuttal" and also provides additional relevant facts for the Board's consideration in this proceeding.

III. ALBEMARLE IS NOT ENTITLED TO EMERGENCY RELIEF

Albemarle makes a number of sweeping allegations and loose assertions in its Petitions, but when stripped of such rhetoric its request for emergency relief is founded solely on its claim that LNW is under a common carrier obligation to provide intra-plant switching between the Albemarle storage tracks located on the west side of the LNW main line and the Albemarle plant facility located on the east side of the main line. Albemarle concedes that it can and will

[4] See August 22 Letter at 1.

continue to provide its own intra-plant switching service on the east side of the LNW main line. However, it seeks an order either directing LNW to continue providing intra-plant service from the west storage tracks to the east side plant or authorizing the Ouachita Railroad to "use LNW tracks" to provide such service.

A. Emergency Relief Not Available In Dispute Over Charges

As noted above in the factual discussion, Albemarle's real complaint here is with the charge that LNW seeks for providing intra-plant switching at the South Plant. Even assuming that LNW was required to provide intra-plant switching (which LNW vigorously disputes), Albemarle has not made any showing that there has been a measurable, substantial deterioration in LNW's intra-plant switching service over an identified period of time. See 49 C.F.R. § 1146.1(a). Albemarle is not entitled to an emergency service order based on its concern about the applicable charges for railroad service. See Keokuk Junction Railway Company – Alternative Rail Service – Line of Toledo, Peoria and Western Railway Company, STB Finance Docket No. 34397, slip. op. at 6 (STB served Oct. 31, 2003)(denying alternative service order because "[r]ate disputes do not constitute service disruptions or inadequacies within the meaning of 49 U.S.C. 11123")("Keokuk Junction").

In its August 22 Letter, Albemarle uses its fertile imagination in a feeble attempt to avoid application of the rule established in the Keokuk Junction case. Albemarle miraculously claims that the Keokuk Junction case "has no bearing" on Albemarle's Petition because of a perceived distinction between contract and tariff rates being offered by LNW.[5] LNW has and is offering to provide the intra-plant switching at $400 per car based on a minimum of 8 cars per day, 4 days a

[5] See August 22 Letter at 1-2.

week.[6] LNW has not made any distinction between contract and tariff offers and is shocked by Albemarle's assertion that it is "willing to receive service" under the existing tariff and "sort out the level of charges and minimums through the pending litigation" before the Board and the courts. This calls into question all of the settlement proposals discussed between the parties with respect to intra-plant switching, where no distinction was made between contract and tariff rates. The LNW proposal is based on a good faith offer of $400 per car (less than the $500 per car charge set forth in the December 2005 tariff). Albemarle's refusal to accept that charge does not warrant the emergency relief it seeks here under the principle established in the Keokuk Junction case. Albemarle's attempt to distance itself from that principle, and its claim that "it is LNW which seeks to turn this into a rate dispute" (see August 22 Letter at footnote 3), is pure fantasy

B. Emergency Relief Not Available For Services LNW Not Obligated To Provide

Moreover, Albemarle fails to explain how any of the statutes it cites obligate LNW to provide such intra-plant switching service to Albemarle. LNW has a common carrier obligation under 49 U.S.C. § 11101 to provide linehaul service to Albemarle's plant, but is not obligated to provide intra-plant switching services beyond its common carrier obligation to drop off or "spot" cars upon the completion of a linehaul movement and to pick up or "pull" cars prior to the initiation of a linehaul movement. The service at issue here concerns switch movements to, from and between Albemarle's storage, weighing and plant loading tracks (some of which are located on LNW property) separate and apart from LNW's linehaul service.

As explained in the context of inbound service, it is the "responsibility of the carrier, as part of the transportation service covered by the linehaul rate, to 'deliver' the goods by placing them in such a position as to make them accessible to the consignee." *Sec'y of Agriculture v.*

[6] See August 21 Letter from Edward Fishman to the Honorable Vernon Williams ("August 21 Letter") at 1-2.

U.S., 347 U.S. 645, 647 (1954). The "railroad's job ends when it has placed the car on the consignee's siding." *Id.*; *see also U.S. v. American Sheet & Tin Plate Co.*, 301 U.S. 402, 410 (1937) (affirming ICC finding that plant spotting service is not part of linehaul movement); *U.S. v. Wabash Co.*, 321 U.S. 403, 409 (1944) (affirming ICC finding that service between interchange tracks and points of loading and unloading is plant service for which carrier can impose additional charges).

Thus, the linehaul obligation of a common carrier is to "provide a freight car and deliver it to a reasonably convenient place within the industrial plant area where it can be loaded or unloaded." *Mobil Chemical Company – Petition for Declaratory Order – Applicability of Switching Charges – Privately-Owned Hopper Cars*, 362 I.C.C. 8, *12 (I.C.C. served October 18, 1979) The carrier is not required to render service "beyond a reasonable delivery point, under its linehaul rates." *Id.* The same concept applies to outbound deliveries, as the common carrier's obligation only extends to pulling cars that have been placed into position by the shipper.

LNW fulfills its common carrier duties when it spots cars at and pulls cars from Albemarle's plant facility as part of the linehaul movements. Subsequent intraplant switching, storage, or weighing activities on Albemarle's private tracks, or on LNW switch and storage tracks that were previously leased to Albemarle, are ancillary services for which LNW charges a separate, additional rate, and over which the Board does not have jurisdiction. Many railroads provide these services based on commercially negotiated terms with their customers. In this case, Albemarle has refused to reach an agreement with LNW on commercially negotiated terms and therefore LNW is not obligated to provide such service to Albemarle.

C. 20-Day Notice Requirement Not Applicable Here

The 20-day notice requirement cited by Albemarle under 49 U.S.C. § 11101(c) only applies to increases in the rates or changes in the terms applicable to service that LNW is required to perform as part of its common carrier obligation. LNW has the discretion to stop providing voluntary intra-plant switching services to Albemarle, and is not obligated to provide Albemarle with 20-days advance notice of any such decision. Moreover, even assuming that § 11101(c) was applicable to LNW's intra-plant switching service, the 20-day notice provision only applies to increases in common carrier rates. In this case, LNW has offered to decrease its applicable rate or charge from $500 to $400 per car and therefore the 20-day notice provision does not apply.[7]

IV. ALBEMARLE DISREGARDS LNW'S SAFETY CONCERNS

Albemarle's continuing disregard of LNW's safety concerns is epitomized by Albemarle's belief that its third party contractor can "easily provide switching without interfering with LNW's linehaul operations." Albemarle seems to believe that because LNW "runs only 4 trains per week" over its mainline and because LNW allows another customer (SMI Steel) to use a portion of the LNW mainline on the southern end of the LNW system for limited switching of non-hazardous materials, that Albemarle can simply insert its third party contractor onto the LNW mainline to switch chlorine and other highly hazardous materials merely because that entity is ready and willing to provide switching for Albemarle.

Once again, Albemarle ignores the fact that LNW handles highly hazardous materials for

[7] Albemarle also refers to commitments made by LNW's counsel and prior General Manager following a meeting with the Associate Director of the Board's Office of Compliance and Enforcement ("OCE") in February, 2006. See Petition at 4. As Albemarle's counsel knows full well, the OCE meeting took place only days after LNW's counsel was retained in this matter, before LNW or OCE had a full understanding of the relevant facts, and in the context of clear and repeated objections by LNW's counsel to the Board's jurisdiction over LNW's intra-plant switching (and, by implication, the applicability of the 20-day notice requirement).

Albemarle on very light weight 75 pound rail over hilly terrain in the vicinity of the Albemarle plant. LNW's fears about the potential catastrophic liability risks associated with such service have been confirmed by two recent derailments involving hazardous materials destined for the South Plant. Fortunately, there were no significant spills or releases of hazardous materials in these incidents. However, LNW has very serious and legitimate concerns about the storage of chlorine and other highly hazardous materials on its property without adequate liability protection and the safety of repeated switching of hazardous chemicals over and across its mainline. These safety concerns are compounded when more than one entity is operating in close proximity.

Albemarle provides scant information about the qualification of its third-party contractor Ouachita Railroad ("Ouachita"), other than the self-serving assertion that Ouachita is "highly qualified" to provide the service in dispute because it is a Class III railroad.[8] LNW respectfully submits that having obtained an exemption as a Class III railroad does not necessarily equate with being an experienced, qualified and competent railroad operator for the proposed intra-plant switching of highly hazardous materials over light weight track on extremely hilly terrain. Albemarle provides no information on the actual qualifications of Ouachita, the type of equipment and experience of its personnel that would be used to provide the requested service, or Ouachita's proposed operating plan to avoid interference with LNW's operations over its mainline and LNW's continued provision of linehaul service (including related spot and pull service) at the South Plant.

[8] See August 22 Letter at 2. LNW notes that one of Ouachita's affiliates, the Central Columbiana and Pennsylvania Railroad, filed for bankruptcy protection in June 2004 as a result of derailments and other problems it encountered operating a line of railroad between Youngstown, OH and Darlington, PA that has been the subject of protracted disputes in the Railroad Ventures proceedings before the Board.

LNW strongly objects to Albemarle's attempt to force Ouachita onto LNW's property for several reasons. First, LNW has serious doubts about the qualifications of Ouachita personnel to handle highly hazardous materials on LNW's active mainline, with its light weight rail and hilly terrain (particularly in light of recent derailments involving LNW's experienced crews). Second, LNW has serious concerns about the adequacy of the leased railcar mover that Albemarle would provide for Ouachita to perform this service. LNW does not believe that this piece of equipment is adequate for the switching service that LNW provides over its mainline. LNW believes that Albemarle's willingness to return 100% of the switching business to LNW earlier this month reflected dissatisfaction with both the performance of Ouachita and the leased equipment (as compared to the historical intra-plant switching provided by LNW). Third, LNW, its employees and their labor organizations have substantial concerns about allowing Ouachita to operate over the LNW mainline while LNW continues to use that mainline and other tracks with the South Plant for linehaul service. Given the highly hazardous nature of the chemicals that would need to be handled by the two railroads, and the unfamiliarity of the Ouachita personnel with the LNW track and terrain, LNW believes this would be a recipe for disaster. Of course, Albemarle doesn't seem to mind. It refers to LNW's safety concerns as "pure hyperbole," takes comfort in its belief that LNW switching is not performed near towns or residential areas (despite the dangers associated with chlorine gas clouds) and even has the audacity to state that "the risk of handling hazardous materials is irrelevant" to Albemarle's Petition.[9] This dispute is all about the dangers faced by a small railroad such as LNW in storing and handling hazardous materials for a customer without adequate liability and economic protection.

V. CONCLUSION

[9] See August 22 Letter at 3.

For the foregoing reasons, LNW respectfully requests that the Board deny the Petition for Emergency Service Order and related Petition for Immediate Relief that Albemarle filed on August 18, 2006.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2006 a copy of the foregoing Reply In Opposition was served by hand delivery and overnight mail (as indicated below) to:

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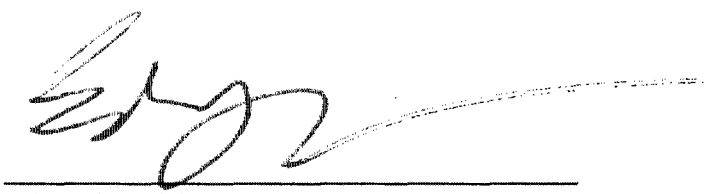

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